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No. 77-1099

In the Supreme Court of the United States

OCTOBER TERM, 1977

MYRON BUTTRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court improperly admitted testimony recounting out-of-court statements of an accomplice and that the evidence was insufficient to support his conviction.

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343 and 2. He was sentenced to two years' imprisonment and fined $1,000. The court of appeals affirmed (Pet. App. 72-74).

The evidence at trial showed that in the fall of 1975 petitioner and Frank Exum[1] participated in a fraudulent

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[1]After government psychiatrists determined that Exum was mentally ill, the charges against him were dismissed at the government's request (Pet. App. 51).

scheme to solicit investments in machines they asserted were capable of profitably extracting gold and silver from thermal well waters in the Imperial Valley of California. On October 1, 1975, Exum telephoned a Pennsylvania businessman, J. Robert Baldwin, and offered him a 25 percent interest in such a machine for $175,000 (Pet. App. 51-52). Exum told Baldwin that the machine was producing one million dollars worth of gold a day. Baldwin suspected, however, that Exum's offer was fraudulent and alerted the F.B.I. The following day, in the presence of an F.B.I. agent, Baldwin called Exum, who confirmed the terms of his offer (Pet. App. 52).

On October 8, 1975, Baldwin talked by telephone with both Exum and petitioner; Exum came on the line first and then introduced petitioner as "[a] man who [is] worth over five hundred million and who could buy and sell [him] ten times over" (Tr. 45-46). Petitioner himself then told Baldwin that gold was being extracted from the wells and that "we are talking about gold and lots of it." He in fact represented that his mineral extracting enterprises would make profits of 200 million dollars a day (Tr. 49). Petitioner also reconfirmed the exact details of Exum's original proposal, including that Baldwin would not pay for operating costs and that Baldwin could, if he wished, buy shares of additional machines (Tr. 46-49, 118-119). Later that day, petitioner was arrested in California after he and Exum had repeated their misrepresentations to two F.B.I. agents who were posing as Baldwin's representatives (Tr. 127-150).[2] The October 8, 1975,

[2]There was evidence that other investors had put over $250,000 into the process, in reliance on an assay report supplied by petitioner, and that one other investor had committed an additional $150,000 (Pet. App. 68).

conversation formed the basis of petitioner's conviction for wire fraud.[3]

1. Petitioner contends (Pet. 16-24) that testimony of Baldwin and F.B.I. Agent Bokal concerning statements made by Exum in telephone conversations with Baldwin was inadmissible hearsay. Exum's statements, however, were not recounted to prove the truth of the matters asserted by him—*i.e.*, that there existed a machine capable of extracting gold from water at a phenomenal rate—but rather were introduced as the *corpus delicti* of the crime of wire fraud. They therefore could not be hearsay, and they were properly admitted. See Fed. R. Evid. 801(c); *United States* v. *McDonnel*, 550 F. 2d 1010, 1012 (C.A. 5), certiorari denied, No. 76-1829, October 3, 1977; *United States* v. *Burke*, 495 F. 2d 1226, 1232 (C.A. 5), certiorari denied, 419 U.S. 1079; *United States* v. *Tyminski*, 418 F. 2d 1060, 1062 (C.A. 2), certiorari denied, 397 U.S. 1075.

Nor is petitioner correct in asserting (Pet. 22) that admission of testimony about Exum's statements violated his right of confrontation. "From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard." *Dutton* v. *Evans*, 400 U.S. 74, 88 (footnote omitted). Here, Baldwin and Agent Bokal were available for cross-examination as to the relevant fact—Exum's utterance of the statements in question.

In addition, as the district court concluded (Pet. App. 56-58), since there was "persuasive evidence at trial of an

[3]The earlier calls involving only Exum were the basis for two additional counts, on which petitioner was acquitted (Pet. App. 52).

agent-principal relationship between Exum and [petitioner]," as well as evidence that petitioner "adopted and ratified [Exum's] misrepresentations" during the October 8 telephone conversation, testimony concerning Exum's statements was admissible as the statement of an agent under Fed. R. Evid. 801(d)(2)(C) or (D).[4] In any event, as the court further observed (Pet. App. 62-63), petitioner could not have been harmed by the cumulative effect of admission of Exum's statements. Petitioner's own statements during the October 8 conversation with Baldwin outlined all the elements of the proposal and standing alone were sufficient to support his conviction of wire fraud.

2. Petitioner next contends (Pet. 25-48) that there was insufficient evidence of intent to defraud to support his conviction.[5] But as the court below correctly concluded

[4]Rule 801 provides:

> (d) **Statements which are not hearsay.** A statement is not hearsay if—
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> * * * * *
>
> (2) * * * The statement is offered against a party and is * * * (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship * * *.

[5]Petitioner also asserts (Pet. 9, item 6) that, as a matter of law, he could not violate 18 U.S.C. 2(b) by "willfully caus[ing] an act to be done [by Exum] which if directly performed by him * * * would be an offense," because Exum lacked legal capacity to commit a crime. The court instructed the jury as to the elements of a violation of 18 U.S.C. 2 (contrary to petitioner's assertion, Pet. 9, item 5) and correctly stated that whether Exum was mentally competent or not was irrelevant (Tr. 1498). Section 2(b) reaches the use of an innocent or irresponsible agent and does not require criminal intent on the part of the agent. *United States* v. *Lester*, 363 F. 2d 68, 73 (C.A. 6), certiorari denied, 385 U.S. 1002; *United States* v. *Inciso*, 292 F. 2d 374, 378 (C.A. 7).

(Pet. App. 69), "the evidence viewed in the light most favorable to the government substantially supports [petitioner's] conviction of wire fraud." Evidence that petitioner had made the alleged representations concerning his scheme to extract gold from well waters in California was uncontradicted. Moreover, the evidence disclosed that "[petitioner] had been told by at least four people of the inaccuracy of the inflated assay reports," and indeed he "conced[ed] that there was never any significant possibility of gold or silver recovery from the Imperial Valley of California" (Pet. App. 66, 69).

Finally, contrary to petitioner's view (Pet. 47-48), it is settled that a fraudulent scheme need not bear fruit for the wrong-doer or cause injury to the intended victim in order to violate the wire fraud statute. The statute only requires that a scheme be devised and the telephone be used as a step in executing the scheme. See *United States* v. *Pollack*, 534 F. 2d 964, 971 (C.A.D.C.), certiorari denied, 429 U.S. 924; *Huff* v. *United States*, 301 F. 2d 760, 765 (C.A. 5), certiorari denied, 371 U.S. 922.[6]

[6]Petitioner relies (Pet. 47-48) on language relating to the mail fraud statute in *United States* v. *Baren*, 305 F. 2d 527, 528 (C.A. 2), and in *United States* v. *Rabinowitz*, 327 F. 2d 62, 76 (C.A. 6) (quoting *Baren*), that "[i]n every mail fraud case * * * some person or persons must have been defrauded." But as the Second Circuit later noted in *United States* v. *Andreadis*, 366 F. 2d 423, 431, certiorari denied, 385 U.S. 1001, the passing statement in *Baren*, *supra*, was not intended to overrule the well-established principle that, in order to establish mail fraud, it is not necessary to prove that persons are actually defrauded. Rather, *Baren* meant only that, in those cases where the product can actually do what is advertised, the government must produce evidence that purchasers were nonetheless in some way defrauded. *Baren*, as construed by *Andreadis*, is clearly not applicable here, since petitioner's wells were patently incapable of performing as advertised.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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